Supreme Court, U.S.
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No. 98-1750

IN THE

Supreme Court of the United States

DUANE KALEY, PORTAGE COUNTY SHERIFF, *et al.*,

Petitioners,

v.

PATTI L. GALLO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a County Deputy Sheriff can be questioned as a witness, after he has been granted judicial immunity, for the purpose of considering whether the Sheriff's Department, not the Deputy, violated either a common law or constitutional duty to the Respondents.

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STATEMENT OF THE CASE

This incident arose out of the shooting of Patti Gallo by her husband, Richard Gallo, in the marital home, just a few yards away from the Portage County Deputy Sheriff who was supposed to be protecting Patti Gallo from her husband. Plaintiffs filed their Complaint on July 9, 1996. The Complaint asserts claims sounding in negligence; intentional tort; reckless, willful, and/or wanton misconduct under state law; and 42 U.S.C. § 1983 claims in violation of Mrs. Gallo's constitutional rights. Because of the existence of the Federal Civil Rights claims, the action was removed to the United States District Court for the Northern District of Ohio by the Defendants: the Portage County Sheriff's Department, Portage County and its Commissioners, and Deputy Jirousek (hereinafter the "Portage County Defendants").

On January 3, 1997, the Portage County Defendants filed a Motion to Dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure claiming quasi-judicial immunity for all the Portage County Defendants on grounds that the deputy was acting as an extension of the Domestic Relations Court when the shooting occurred. The District Court granted this Motion as to Deputy Jirousek. However, the District Court denied the Motion as to the remaining Portage County Defendants.

The remaining Portage County Defendants appealed the matter to the United States Court of Appeals for the Sixth Circuit, and arguments were heard on January 25, 1999. This Court ruled from the bench following oral argument and affirmed the District Court's decision. The Petitioners then requested a Rehearing En Banc on the grounds this Court's decision conflicts with the decision in *Johnson v.*

Turner, 125 F.3d 324 (6th Cir. 1997). By Entry dated April 4, 1999, Petitioners Petition for Rehearing En Banc was denied.

The Petitioners have now requested that this Court review the same question which has been reviewed and denied one time by the United States District and two times by the United States Court of Appeals for the Sixth Circuit. For the reasons which follow, this Court should deny Petitioners request for a Writ of Certiorari.

STATEMENT OF FACTS

Mrs. Gallo and Richard Gallo were married in 1988, and they are the parents of two minor children: Lauren Mary Gallo, age 7, and Richard Tyler Gallo, age 3. During this marriage, there were numerous episodes of domestic violence and physical and emotional abuse, including threats by Richard Gallo that if Mrs. Gallo ever left him, he would burn down the house and kill her. (Affidavit of Mrs. Gallo, attached as Exhibit A to the Amended Complaint).

On March 16, 1996, out of fear for her life, health, and safety, and after providing for the protection of her children, Mrs. Gallo left Richard Gallo and took refuge at the Battered Women's Shelter in Akron, Ohio. On March 18, 1996, she was transferred to another, similar shelter for battered women in Portage County, known as Safer Futures, in Kent, Ohio. (Amended Complaint at pp. 2-3). The Sheriff's Department knew all of this.

On March 22, 1996, Mrs. Gallo instituted divorce proceedings against her husband. On that same date, Mrs. Gallo requested and was granted a Temporary Restraining Order (hereafter TRO). The Court issued the TRO because

of the history of physical, verbal, and sexual abuse in the marriage and threats made by Richard Gallo against his wife.

Under the terms of the TRO, Richard Gallo was restrained and enjoined from verbally or physically abusing his wife or their children and, for Mrs. Gallo's protection, a member of the Portage County Sheriff's department was ordered to accompany Mrs. Gallo to her home so she could obtain her clothing and personal effects, as well as clothing and personal effects of her children. The TRO said, in pertinent part:

> UPON oral Motion with Supporting Affidavit and for good cause shown, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant, RICHARD GALLO, be and hereby is restrained and enjoined from verbally or physically abusing plaintiff or the parties' minor children or in any manner interfering with their personal liberty or well-being.
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> * * *
>
> IT IS THE FURTHER ORDER OF THIS COURT that plaintiff be permitted to enter the marital home to be accompanied by a Deputy Sheriff to remove her clothing, personal effects as well as the clothing and personal effects for the children and documents necessary to present to the Court at the Temporary Hearing.

(Amended Complaint, Exhibit B).

In the early morning hours of March 23, 1996, the home formerly occupied by Patti and Richard Gallo and their children was burned. On numerous occasions thereafter, Mrs. Gallo informed agents or employees of the Sheriff's Department, as well as Deputy Sheriff Jirousek, of her belief as to the cause of this fire and expressed concern to these same persons that Richard Gallo would carry out his previously expressed threats to harm her.

After the fire at the Gallo home, but prior to the incident which gives rise to this lawsuit, Richard Gallo was seen in the neighborhood seeming to "stalk" the Gallo home and exhibiting strange bizarre behavior. The Sheriff's Department was aware of these activities.

On March 26, 1996, arrangements were made for Mrs. Gallo to visit her burned home and to retrieve some of her personal belongings and effects. In accordance with the TRO, she was to be accompanied by and under the protection of deputy sheriff Jirousek. The Sheriff's Department knew that Richard Gallo would be present at the home at the same time. (Amended Complaint at p. 4).

On the morning of March 26, 1996, just prior to visiting the burned home, an agent or employee of the Sheriff's Department, upon being informed of Richard Gallo's peculiar appearance and behavior around the Gallo home that morning, gave assurances that the Sheriff's Department would protect Mrs. Gallo from her husband.

On March 26, 1996, shortly after noon, Mrs. Gallo was in her former home with Richard Gallo, deputy sheriff Jirousek, and others in order to assess the fire damage and to retrieve some of her personal belongings. Deputy sheriff

Jirousek was present for the sole purpose of protecting the Plaintiff from being harmed by Gallo. At approximately 12:15 p.m., on March 26, 1996, Mrs. Gallo entered the master bathroom of the Gallo home, which is off the master bedroom. Richard Gallo then stepped into the doorway between the master bedroom and master bathroom. He pulled a 38-caliber handgun from his jacket, shot Mrs. Gallo in the head, and then shot himself in the head. At the time of this incident, deputy sheriff Jirousek was standing outside the master bedroom in the upstairs hallway. Neither Mrs. Gallo nor Richard Gallo were within eyesight of deputy sheriff Jirousek at the time of the shooting.

Immediately after the Incident, Jirousek admitted that he failed to protect Mrs. Gallo as he was required. Jirousek stated that he should have kept Mrs. Gallo and Richard Gallo separated but did not. Jirousek also claimed that he should not have allowed Patti and Richard Gallo in the marital residence at the same time. (Amended Complaint at p. 5).

Prior to hiring Jirousek, the Sheriff's Department had knowledge that Jirousek was not recommended for police work. The Sheriff's Department also knew Jirousek had a tendency to display poor judgment, and he had difficulty relating to women in a superior position. In spite of this knowledge, the Sheriff's Department hired Jirousek as a deputy sheriff. (Amended Complaint at p. 5).

After hiring Jirousek but prior to Mrs. Gallo being shot, the Sheriff knew that Jirousek was not capable of protecting Mrs. Gallo. The Sheriff knew that Jirousek's knowledge of his work was limited, that he needed constant supervision, that his judgment was limited, that he lacked initiative, and that he was not dependable. Moreover, it was recommended

to the Sheriff that Jirousek's duties for the Sheriff's Department be limited to working as a corrections officer at the prison. In spite of this knowledge and contrary to the recommendations, the Sheriff's Department assigned Jirousek the responsibility of protecting Mrs. Gallo. (Amended Complaint).

The Sheriff's Department also knew that Jirousek was alleged to have subjected his wife to domestic abuse. In spite of this knowledge, the Sheriff's Department assigned Jirousek to protect Mrs. Gallo from her domestic abuser, Richard Gallo. (Amended Complaint at p. 6).

REASONS FOR DENYING THE WRIT

A. Dismissal of the deputy on immunity grounds does not preclude inquiry into whether the Respondents' suffered any constitutional depravation as a result of the local governments policies and/or practice.

Contrary to the Petitioners' claims, judicial immunity is not at risk in this case. As it relates to the Portage County Defendants, this case has absolutely nothing to do with judicial immunity.

Petitioners have resurrected their argument that judicial immunity precludes inquiry into the actions of a deputy sheriff. Petitioners are wrong. First, the purpose of qualified and absolute immunity is the same. Namely, the purpose is to eliminate the threat of liability that would detour the individual, whether it be a judge, legislator, or public official, from executing his office with the decisiveness and judgment required for the public good. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Butz v. Economou*, 438 U.S. 478 (1978).

No distinction can be made on grounds that the quasi-judicial immunity is different from the qualified immunity. There is no reason why an exception should be made for quasi-judicial immunity.

Second, the integrity of judicial immunity does not require that there be no inquisition into Deputy Jirousek's conduct once he is granted judicial immunity. This is an argument without merit or a basis in the law. Defendants cite no rule of law or evidence that would preclude such inquiry. The deputy's immunity from liability does not give him any privilege that would excuse him from testifying or serving as a witness about what training he received from the Portage County Sheriff's Department. Moreover, it is difficult to understand how inquiry into the deputy's knowledge of the county's policies and practices relevant to the handling of domestic violence situations where the county's knowledge that the deputy was incapable of handling the task assigned to him could possibly have any effect on the Domestic Relations Court in assisting parties before it.

The deputy's immunity does not bar further inquiry into his conduct or knowledge as to the Sheriff Departments policies and practices for purposes of establishing a constitutional violation by the County Sheriff's Department. The District Court and the Sixth Circuit have so ruled. There is no reason to revisit this issue.

B. *Johnson v. Turner* does not preclude inquiry into the Deputy's conduct.

The *Johnson* case did not overrule the long standing rule that counties are immune from 42 U.S.C. § 1983 claims. That issue has been squarely settled by this Court in *Owen*

v. City of Independence, 445 U.S. 622 (1980) and *Leatherman v. Tarrant County Narcotics, Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Despite the clear statements by this Court that neither absolute nor qualified immunity protect local governments, the Portage County Defendants are asking this Court to resurrect absolute immunity for local governments. This is something *Johnson* did not do.

What *Johnson* did do was to hold that the Plaintiff must "identify the policy, connect the policy to the count, and show that the particular injury was incurred because of the execution of that policy." *Id.* at 335. Because Petitioners' argument arose in a Motion to Dismiss, this case, however, has not been developed to the point where the policy maker can be identified. There has been *no* discovery as to the Portage County's policies and procedures or who is the final policy maker. The parties are prevented by this action from engaging in discovery and determining who the policy maker was.

Next, the Petitioners erroneously claim that *Johnson* stands for the proposition that there cannot be any consideration into whether the *sheriff's or county's policy or practice* caused deputies to act in a manor infringing on Plaintiffs' constitutional rights. That is not at all what the *Johnson* Court held. The *Johnson* Court concluded that the memorandum in issue was not a "policy" of the county, but rather it was a general restatement of state law. The Court also noted that the county government could not have altered the state statute, nor could it have required the judge to interpret the statute differently or interfere with the means used by the Juvenile Court to carry out state law. *Id.* at 335-36.

Since it was the *state's policies* which were in question, and the county did not promulgate those statutes nor could it alter those statutes, the county could not be held responsible for them.

In contrast to *Johnson*, it is not the order of the Domestic Relations Court or a state statute that is being challenged in this action. Rather, it is the Portage County's own policies and practices which are being challenged. Plaintiffs' Complaint alleges causes of actions and constitutional deprivation flowing from the county's own policies and practices relative to what training deputy sheriffs are given regarding domestic violence and how deputy sheriffs handle domestic violence situations. Plaintiffs' claim does *not* challenge the judge's Order or a state statute. The District Court and the Sixth Circuit Court of Appeals properly declined to extend quasi-judicial immunity to the county, its board of commissioners, and the sheriff. There is no conflict between this case and *Johnson*. This Court should deny Petitioners' request for a Writ of Certiorari.

CONCLUSION

There is no reason for a Writ of Certiorari to issue in this case. There is no conflict in the case law, nor is there any just reason to preclude inquiry into Deputy Jirousek as a witness.

Respectfully submitted,

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